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GUST ROSENFELD P.L.C.
201 N. Central Avenue, Suite 3300
Phoenix, AZ 85073.3300
(602) 257-7473
Michael Salcido - 009828

Attorneys for Respondent

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

Arizona Corporation Commission
DOCKETED
MAY 24 2002

DOCKETED BY	
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In the matter of:

CLAY EUGENE LAMBERT
3711 East Minton Place
Mesa, Arizona 85215
CRD No. 1959853,

Respondent.

) Docket No. S-03413A-01-0000

) **MOTION TO STAY**
) **ADMINISTRATIVE**
) **PROCEEDING**

) **Expedited Oral Argument Requested**

Respondent Clay Eugene Lambert ("Lambert") moves that this administrative action be stayed. Lambert just learned that he is under criminal investigation by the Arizona Department of Insurance ("DOI") and the Arizona Attorney General ("AG"). This action should be stayed until those offices make a decision on whether or not to bring a criminal action against Lambert. A stay would not prejudice the Securities Division ("Division") or its "victim," Woods.

Factual Background

On June 25, 2000, the Division's "victim" filed a lawsuit against Lambert. On September 21, 2000, Lambert gave his first Examination Under Oath (EUO) to the Division. On March 8, 2001, he gave a second EUO. On November 9, 2001, judgment was entered in favor of the Division's "victim" for \$937,372.50.

1 As the Commission knows, Lambert declared bankruptcy. On March 25,
2 2002, the Division's lawyer in this case appeared at Lambert's first meeting of creditors.
3 He questioned Lambert under oath even though he knew that Lambert was represented
4 by counsel undersigned. The Division had already taken Lambert's testimony twice. If,
5 in fact, the Division needed information for its case, it could have sent a subpoena or
6 document request to Lambert or his lawyer. Instead, it improperly questioned Lambert
7 without counsel present.

8 On April 15, 2002, the DOI sent a letter to Lambert requesting a meeting.
9 It is likely that the Division was the impetus behind the DOI investigation. Lambert did
10 not receive this letter. The investigator for the DOI, Dan Ray, followed up with counsel
11 undersigned. Mr. Ray advised counsel undersigned that as of April 15, 2002, Lambert
12 was under criminal investigation.

13 **The Division Should Not Have Questioned**
14 **Lambert Without Counsel Present**

15 If Lambert was under criminal investigation as of April 15, 2002, it is
16 more than likely that he was also under criminal investigation as of March 25, 2002. As
17 such, what business does the State have questioning a client under criminal
18 investigation, without his lawyer present? The Division cannot hide behind the fact that
19 these are "separate agencies," since it has routinely been funneling information on
20 Lambert to the DOI and the AG.

21 **The Action Should Be Stayed Under The**
22 **Doctrine Of Parallel Proceedings**

23 Lambert is subject to parallel, simultaneous, administrative and criminal
24 proceedings. A court may decide in its discretion to stay civil proceedings pending the
25 outcome of criminal proceedings "when the interests of justice seem [] to require such
26 ...

1 action], sometimes at the request of prosecution, . . . sometimes at the request of the
2 defense. *United States v. Kordel*, 397 U.S. 1, 12 (1970).

3 Whether to grant such stays is within the trial court's discretion. *Afro-*
4 *Lecon v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987). If parallel proceedings
5 would substantially prejudice the defendant's rights, however, the court should stay the
6 proceedings. *Securities and Exchange Commission v. Dresser Industries*, 628 F.2d
7 1368, 1374 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980).

8 The court should consider a number of factors, including whether the civil
9 and criminal proceedings involve the same matter, whether resolution of the criminal
10 case would moot, clarify or otherwise affect various contentions in the civil case, and
11 whether the possibility exists that a party might exploit civil discovery for the
12 advancement of a criminal case. *State v. Ott*, 167 Ariz. 420, 808 P.2d 305, 314 (App.
13 Div. 1, 1990), citing *United States v. Mellon Bank*, 545 F.2d 869, 873 (3rd Cir. 1976).

14 Additional circumstances weighing in favor of the stay include "malicious
15 prosecution, the absence of counsel for defendant during depositions, agency bad faith,
16 malicious government tactics and other special circumstances." *Id.* citing *Afro-Lecon*,
17 820 F.2d at 1202.

18 Other than where there is specific evidence of agency bad faith or
19 malicious governmental tactics, the strongest case for deferring civil is where a party
20 under indictment for a serious offense is required to defend a civil or administrative
21 action involving the same matter. *SEC v. Dresser* at 1376. A non-criminal proceeding,
22 if not deferred, might undermine the party's Fifth Amendment privilege, expand rights
23 of criminal discovery beyond the limits of Criminal Rules of Procedure, expose the
24 basis of the defense to the prosecution in advance of criminal trial, or otherwise
25 prejudice the case. If delay of the non-criminal proceeding would not seriously injure
26 the public interest, a court may be justified in deferring it. *Id.*

1 **There Is No Prejudice To The Division Or Its "Victim"**

2 **If This Action Is Stayed**

3 The Division no doubt will jump up and down and scream that it will be
4 "prejudiced" by a stay. That is nonsense. On November 9, 2001, a judgment for
5 \$937,372.50 was entered against Lambert, and Lambert entities, in favor of Woods.
6 This is even more than the Division is requesting in its Notice. Therefore, the
7 Division's "victim" is already monetarily protected, pending the bankruptcy.

8 There is no prejudice to the Division respecting its regulatory duties
9 because Lambert is not currently licensed as a securities salesman. Lambert will
10 stipulate to an interim cease and desist order, and agree not to apply to be a securities
11 dealer or salesman until this hearing is held and decided. Therefore, a stay will not
12 harm the investing public.

13 **Lambert Needs Additional Time To Get A Criminal Lawyer**

14 **Appointed As Special Counsel By The Bankruptcy Court**

15 As this Commission knows, counsel must apply to be appointed by the
16 Bankruptcy Court as Lambert's attorney. Lambert now is under criminal investigation
17 and needs a criminal lawyer. He needs time to find a criminal lawyer, make the proper
18 application, and obtain the appointment. Lambert cannot go forward with this hearing
19 without the benefit of criminal counsel.

20 **Conclusion**

21 The Division has nobody to thank but itself for this mess. This is a matter
22 of an administrative agency "trying too hard to win." Instead of simply conducting an
23 investigation governed by the Securities Act, the Division is attempting to regulate
24 insurance professionals, act as co-counsel in a plaintiff's private litigation, and instigate
25 criminal proceedings. In the process, it may have violated Lambert's rights.

26 ...

1 It is fundamentally unfair for the government to question a person under
2 criminal investigation, represented by counsel, without that lawyer present. Now the
3 Division wants Lambert to show up at the hearing, take the Fifth Amendment (as he
4 likely must at this point), and use that failure to testify to obtain an order. The Division
5 will then use that order to cause Lambert to lose his insurance license, and, possibly, his
6 liberty.

7 This action must be reined in before irreparable damage is done to
8 Lambert and the justice system.

9 RESPECTFULLY SUBMITTED this 24th day of May, 2002.

10 GUST ROSENFELD P.L.C.

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12 _____
13 Michael Salcido
14 Attorney for Respondent

15 **ORIGINAL** and ten (10) copies filed with:

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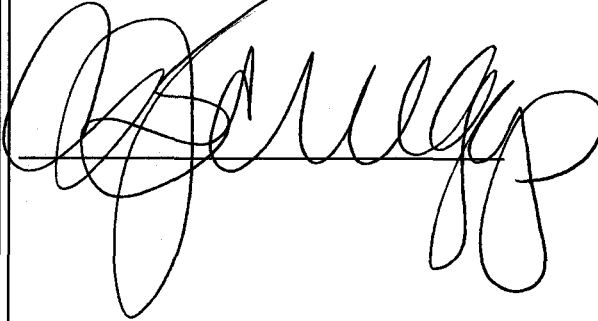
19 **COPY FAXED AND MAILED** to:

20 Phillip J. Dion III
21 Hearing Division
22 Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007-0001

23 Anthony Bingham
24 Securities Division
25 Arizona Corporation Commission
1300 W. Washington, 3rd Floor
Phoenix, AZ 85007-2929

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Lawrence R. Moon, Esq.
Lawrence R. Moon, P.C.
Post Office Box 766
Phoenix, Arizona 85001

A large, stylized handwritten signature in black ink, appearing to read 'Lawrence R. Moon', is written across the middle of the page. The signature is written over the horizontal line of the address block and extends across several of the numbered lines on the left margin.